

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D. C. 20554

**FCC 13M-10**  
09651

In the Matter of	)	EB Docket No. 11-71
	)	
<b>MARITIME COMMUNICATIONS/LAND</b>	)	File No. EB-09-IH-1751
<b>MOBILE, LLC</b>	)	FRN: 0013587779
	)	
Participant in Auction No. 61 and Licensee of	)	
Various Authorizations in the Wireless Radio	)	
Services	)	
	)	Application File Nos.
Applicant for Modification of Various	)	0004030479, 0004144435,
Authorizations in the Wireless Radio Services	)	0004193028, 0004193328,
	)	0004354053, 0004309872,
Applicant with <b>ENCANA OIL AND GAS (USA),</b>	)	0004310060, 0004314903,
<b>INC.; DUQUESNE LIGHT COMPANY, DCP</b>	)	0004315013, 0004430505,
<b>MIDSTREAM, LP; JACKSON COUNTY</b>	)	0004417199, 0004419431,
<b>RURAL MEMBERSHIP ELECTRIC</b>	)	0004422320, 0004422329,
<b>COOPERATIVE; PUGET SOUND ENERGY,</b>	)	0004507921, 0004153701,
<b>INC.; ENBRIDGE ENERGY COMPANY,</b>	)	0004526264, and 0004604962
<b>INC.; INTERSTATE POWER AND LIGHT</b>	)	
<b>COMPANY; WISCONSIN POWER AND</b>	)	
<b>LIGHT COMPANY; DIXIE ELECTRIC</b>	)	
<b>MEMBERSHIP CORPORATION, INC.;</b>	)	
<b>ATLAS PIPELINE-MID CONTINENT, LLC;</b>	)	
<b>AND SOUTHERN; CALIFORNIA REGIONAL</b>	)	
<b>RAIL AUTHORITY</b>	)	
	)	
For Commission Consent to the Assignment of	)	
Various Authorizations in the Wireless Radio	)	
Service	)	

**MEMORANDUM OPINION AND ORDER**

**Issued: May 7, 2013**

**Released: May 7, 2013**

**Background**

1. On February 28, 2013, Warren Havens submitted a Request to Extend Discovery Period and for Other Relief ("Request"). The following day, he submitted a Revised and Supplemented version

of the same pleading. On March 1, 2013, the discovery phase of this proceeding closed.<sup>1</sup> In his pleading, Mr. Havens provides a variety of arguments as to why the discovery period should remain open. For the reasons presented below, Havens' Request is denied.

## **Discussion**

### *Denial of Havens' Motion on Procedural Grounds*

2. In *Order*, FCC 13M-9, the Presiding Judge denied a motion submitted by Mr. Havens because it did not adhere to the electronic filing guidelines for this proceeding.

*Order*, FCC 12M-43, issued September 25, 2012, instructs parties that wish to file electronically to "e-mail a courtesy copy of the electronically filed document to the Presiding Judge that includes a copy of the proof of filing receipt." Havens failed to include a proof of filing receipt with his Motion. The parties to this proceeding have previously been warned that failure to comply with the *Order*'s filing guidelines when submitting a pleading may result in the rejection of that pleading. Accordingly, it is appropriate to reject Mr. Havens' pleading for failure to comply with the *Order*.

Mr. Havens has failed to include a proof of filing receipt with his Request as well. Accordingly, his Request is denied. The merits of Mr. Havens' pleading are examined below out of caution should Mr. Havens refile to seek some other form of discovery.

### *Denial of Havens' Motion on Substantive Grounds*

3. Mr. Havens argues that "because [Maritime Communications/Land Mobile, LLC's ["Maritime's] predecessor] Mobex has been found [in antitrust litigation ongoing in federal district court involving Maritime and the SkyTel entities] as in default, regarding charges of violation of US antitrust law . . . under applicable FCC law the Judge should, and we believe must, consider these [antitrust] violations with regard to issue (g) and all of the other issues in this Hearing."<sup>2</sup> By extension of this argument, he believes that discovery should remain open so that evidence in the antitrust proceeding can be imported to this hearing.<sup>3</sup> This argument is legally incorrect and unpersuasive. In the first place, Mr. Havens has had ample time to seek these documents during the lengthy discovery period provided in this proceeding. Yet he fails to state any reason why he was unable to seek access to these documents within the discovery period.<sup>4</sup> He also fails to provide any legal citation to validate his decision to sleep on his discovery rights. Additionally, Mr. Havens does not provide any plausible argument that shows how documents from an unlitigated antitrust proceeding, bereft of findings of fact and conclusions of law, are relevant to any issues in this proceeding. By solely asserting legal conclusions that the documents in question are relevant to Issue (g) without factual support, he has failed to persuade the Presiding Judge

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<sup>1</sup> See Limited Joint Stipulations Between Enforcement Bureau and Maritime and Proposed Discovery Schedule at 5 (November 28, 2013).

<sup>2</sup> Mr. Havens' Request at 2.

<sup>3</sup> *Id.* at 2-3 ("The evidence of these charges is specified in the Complaint and resides in extensive discovery evidence in this case . . . . Discovery should be extended in this Hearing . . . so that this evidence can be brought into this Hearing for the purposes just stated.").

<sup>4</sup> Mr. Havens cites an *Order* issued by the district judge in the Mobex antitrust case as a basis to extend discovery in this proceeding. That *Order* does not cite any factual information that would support the extension of the discovery period in this proceeding.

that the documents sought should be subject to discovery.<sup>5</sup> Accordingly, his request to extend discovery so that he might seek irrelevant antitrust evidence must be denied.<sup>6</sup>

#### *Further Decisional Considerations on Discovery Extension*

4. Without benefit of an appropriate motion, Mr. Havens seeks to enlarge issues in this proceeding to include: an evaluation of whether Maritime is in “violation of antitrust law.”<sup>7</sup> The burden of persuasion requires that the motion

“contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.”<sup>8</sup>

Mr. Havens’ filing does not satisfy this requirement. He has not filed an affidavit nor cited to facts for judicial notice. Mr. Havens merely states that “evidence of [allegations of antitrust violations] is specified in the [district court] Complaint and resides in extensive discovery evidence in this case.”<sup>9</sup> In this way he would have the Presiding Judge take an investigative journey down an *Alice*-like rabbit hole. His prediction that an *Order* released in the ongoing antitrust proceeding, striking the Answer of Mobex and entering a default order against Mobex, will ultimately result in a judgment of default against Maritime<sup>10</sup> is also unfounded. If Mr. Havens wishes the Presiding Judge to consider issues beyond the scope of the *Hearing Designation Order*, rather than paint a broad picture, he must file an affidavit and recount therein relevant and substantial facts that could support a motion to enlarge the issues.<sup>11</sup>

5. Furthermore, Mr. Havens fails to cite any antitrust issue that is ripe for inclusion in this proceeding. It is Commission policy to consider non-FCC antitrust or anticompetitive misconduct in its character determinations only if there has been “an ultimate adjudication by an appropriate trier of fact, either by a government agency or court.”<sup>12</sup> No such adjudication has been made in the *Havens v. Mobex*

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<sup>5</sup> See 47 CFR § 1.311(b) (“Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues . . . .”)

<sup>6</sup> As a fallback position, Mr. Havens requests that “the [Presiding] Judge impose sanctions upon Maritime by drawing negative inferences regarding issue (g) that Maritime has failed to meet the burden of proof that only the licensee can meet (to keep records and prove stations were lawfully and timely constructed and kept in permanent operation), and thus, the stations have ‘automatically terminated without specific Commission action’ as the relevant Part 1 and Part 80 rules provide.” Havens’ Request at 2. Stated another way, Mr. Havens requests that the Presiding Judge sanction Maritime for allegedly failing to keep certain records by making evidentiary findings and conclusions outside the context of a hearing. Mr. Havens provides no further facts or legal argument in support of his request. It is axiomatic that sanctions will not be placed on Maritime based solely on allegations that certain documents have not been kept, especially where legal support for issuing such sanctions is completely lacking, as is the case here. Further, Mr. Havens does not present sufficient facts to support such a finding. Accordingly, this request is denied as well.

<sup>7</sup> Mr. Havens’ Request is interpreted as a request to enlarge the issues in this proceeding because the “violation of US antitrust law” he wishes the court to consider falls outside of the scope of the issues as described in the *Hearing Designation Order* of this proceeding. See *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011).

<sup>8</sup> 47 CFR § 1.229(d).

<sup>9</sup> Mr. Havens’ Request at 2.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Cf.* 47 CFR § 1.229(d).

<sup>12</sup> *Character Qualifications*, 102 FCC 2d 1179, 1205 (1986), *recon. denied* 1 FCC Rcd 421 (1986). *Cf.* Form 603 (“Has any court finally adjudged the Assignee/Transferee . . . guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication . . . ?” (emphasis added)); 47 USC 313(b) (“The Commission is

in an antitrust proceeding. Accordingly, any request made for the Presiding Judge to consider allegations of antitrust violations against Maritime must be denied until such time that an Article III judge finally adjudicates that case on the merits, and after all appeals are exhausted.

6. Mr. Havens also requests an extension of the discovery period due to his “pending [Freedom of Information Act (“FOIA”)] proceedings.”<sup>13</sup> These “administrative appeals” of FOIA decisions, which Mr. Havens fails to specifically identify, are claimed to involve “Commission Records known to exist and be of core, decisional relevance to the issues in this hearing,” including “records pertaining to the numerous redactions in the [*Hearing Designation Order*], and preceding investigation of Maritime and related persons described in the [*Hearing Designation Order*],” and “Records submitted by Maritime... and other parties in response to discovery demands, and including Records labeled as under the Protective Order in this Hearing as ‘attorney eyes only.’”<sup>14</sup> Mr. Havens expects that these documents will “provide the basis for other likely discovery actions.”<sup>15</sup>

7. Mr. Havens’ request is denied. First, Mr. Havens could have access to an unredacted *Hearing Designation Order* by retaining (and keeping) qualified legal representation.<sup>16</sup> Second, because Mr. Havens’ attempts to secure access to Commission records are governed by Commission rule 1.311(b)(3), which provides that Commission records cannot be acquired through discovery and must instead be acquired via FOIA requests,<sup>17</sup> it makes no sense to delay the close of discovery for document requests that have been made outside of the rules of discovery. Such a ruling would result in all parties having to wait for an unspecified period of time for appeals to be exhausted on an unspecified number of FOIA requests before further action in this proceeding could be taken. Third, Mr. Havens has had ample opportunity to request any and all non-Commission documents that are discoverable under the Commission’s rules.<sup>18</sup> The discovery period will not remain open solely because Mr. Havens has opted to seek access to those discoverable documents through the FOIA process rather than through Commission rules of discovery.

8. Mr. Havens further requests an extension of the discovery period on grounds that discovery is needed on all issues, including the issues outside of Issue (g), regardless of the possibility of

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hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person... whose license *has been revoked by a court* under this section.” (emphasis added)). To the contrary, Mr. Havens argues that “the FCC must consider [any alleged] violation of antitrust law, even independent a determination of violation by a court.” Mr. Havens’ Request at 3. Mr. Havens has totally misread the cases he cites in support of his argument. These cases hold the very different principle that Commission approval of an application will not block antitrust actions that target the transaction to which the application is related. *Cf. United States v. Radio Corporation of America et. al.*, 358 U.S. 334, 350 n.18 (1959) (“This conclusion is re-enforced by the Commission’s disavowal of either the power or the desire to foreclose the Government from antitrust actions aimed at transactions which the Commission has licensed.”); *McKeon Const. v. McClatchy Newspapers*, 51627, 1969 WL 226 at 10 (N.D. Cal. Nov. 24, 1969) (“Even though FCC approval has been granted, transactions are not immunized from challenge under the antitrust laws.”).

<sup>13</sup> Mr. Havens’ Request at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 8.

<sup>16</sup> It is difficult to believe that Mr. Havens has been denied any paraphrased explanation of deleted portions of the *Hearing Designation Order* by his any of four successive well-qualified legal counsel that he retained for this proceeding, and later discharged.

<sup>17</sup> See 47 CFR § 1.311(b)(3).

<sup>18</sup> It is conceivable that Mr. Havens may argue in the future that he has not had a full opportunity to engage in discovery because he was barred from viewing the unredacted versions of documents that the parties have designated as Confidential or Highly Confidential. But the Protective Order in this proceeding, *Order*, FCC 11M-21 (July 20, 2011), and *Order*, FCC 12M-52 (November 15, 2012) provide the only answer of how Mr. Havens may utilize the material so designated—namely through counsel.

*Second Thursday* relief.<sup>19</sup> This request is denied. As stated in an earlier ruling, to proceed with discovery on issues outside of Issue (g) at this time would require the parties to expend significant resources that would be wasted should the Commission grant *Second Thursday* relief.<sup>20</sup> Rather than allow those resources to be wasted, and to accommodate all parties, those issues have been stayed pending Commission action on the application for *Second Thursday* relief of Choctaw Communications and Choctaw Holdings.<sup>21</sup> In the event that Commission action does not moot those issues in their entirety, this proceeding will continue with discovery that would be available to assist the litigation of those issues. The opening of any discovery on issues other than Issue (g) will be considered only by appropriate motion at the appropriate time.

9. Finally, Mr. Havens requests an extension of the discovery period on grounds that SkyTel has been unable to participate in discovery because the Presiding Judge has “restricted, barred, threatened and chilled, and eventually in part reinstated” his ability to participate in this proceeding *pro se*.<sup>22</sup> Mr. Havens’ characterization is way off the mark. The Presiding Judge is confident that SkyTel’s ability to participate in discovery has not been inappropriately limited.<sup>23</sup> Mr. Havens’ fails to identify any instance in which the SkyTel entities were barred from participating in discovery. Rather, he likely refers to his repeated attempts to represent the SkyTel entities in violation of *Order*, FCC 12M-16<sup>24</sup> and the Commission’s rules and decisions.<sup>25</sup> Here, he again seeks to act as legal counsel to the SkyTel entities in this proceeding without the Presiding Judge’s authorization, and thereby creates sufficient grounds to strike this particular argument, which is made solely on SkyTel’s behalf. Even if SkyTel were to secure new counsel and properly raise this request, discovery would be denied because the SkyTel entities and Mr. Havens have had ample opportunity to engage in discovery.

#### ORDER

Accordingly, **IT IS ORDERED** for reasons stated above that Mr. Warren Havens’ Request to Extend Discovery Period and for Other Relief filed February 28, 2013, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION<sup>26</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>19</sup> Mr. Havens’ Request at 9.

<sup>20</sup> *Order*, FCC 13M-6 at 1-2 (March 21, 2013).

<sup>21</sup> *Id.*

<sup>22</sup> Mr. Havens’ Request at 10.

<sup>23</sup> The only discovery limitation the Presiding Judge has placed upon Mr. Havens and the SkyTel entities is that they cannot receive documents labeled confidential until such time that they are represented by counsel who sign on to the Protective Order for this proceeding. *See Order*, FCC 12M-7 at 2-3 (January 27, 2013).

<sup>24</sup> *Order*, FCC 12M-16 at 4 (March 9, 2012) (“Mr. Havens cannot appear in this complex proceeding acting as counsel on behalf of himself and SkyTel. . . . Mr. Havens must obtain new counsel for SkyTel immediately in order for these proceedings to continue with SkyTel’s participation.”).

<sup>25</sup> 47 CFR § 1.21(d).

<sup>26</sup> Courtesy copies of this *Order* sent by e-mail on issuance to each counsel and to Mr. Havens.